CYGAL BHD

v.

BANDAR SUBANG SDN BHD

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ARIFIN JAKA JCA
AUGUSTINE PAUL JCA
[CIVIL APPEAL NO: B-02-874-1998]
12 FEBRUARY 2004

CONTRACT: *Building contract - Performance bond - Bank guarantee for retention sum - Injunction - Application by contractor to restrain principal from demanding/receiving moneys thereunder - Whether performance bond unconditional - Whether a pure on-demand guarantee - Whether terms of building contract incorporated into performance bond and bank guarantee - Whether underlying contract formed part of performance bond - Whether grant of injunction would be inappropriate - Whether would pre-empt ongoing proceedings before arbitrator*

The plaintiff (the main contractor) and the defendant (the employer) had earlier entered into a standard PAM building-contract pursuant to which a performance bond ('the PF') and a bank guarantee for retention sum ('the BGRS') were executed in favour of the defendant. As it transpired, disputes subsequently arose between the parties and the matter was referred to arbitration. Thereafter, the plaintiff terminated the building contract and, fearing that the defendant would call upon the PF and BGRS, applied to the High Court for an injunction to restrain the defendant from demanding and/or receiving the moneys under the PF and BGRS.

The instant appeal by the plaintiff to the Court of Appeal was from the decision of the learned judge refusing its application. Before the lord justices of appeal, it was argued that the learned judge had misdirected himself when he disregarded the underlying contract which formed the foundation for the issuance of the PF and BGRS.

Held (dismissing the appeal)
Per Gopal Sri Ram JCA delivering the oral judgment of the court:

[1] This was a case in which the terms of the building contract between the parties had **not** been incorporated into the PF and BGRS. Thus, the PF herein was unconditional (save that a demand had to be made) and the underlying contract formed no part of the PF. Where a performance bond is stated to be an unconditional and a pure on-demand guarantee, as were the PF and BGRS in the present case, an injunction as in the terms prayed for by the plaintiff herein would be inappropriate. (pp 70 g-h & 71 a-d & g)

[2] The basis of the plaintiff's application for the injunction was that it had not committed any breach of contract and, therefore, the defendant should not have called upon the PF and BGRS. However, this very issue of whether there was a breach of the building contract has been referred to arbitration, and a finding by the instant court on that issue would pre-empt the arbitrator's finding and encroach onto the jurisdiction already vested in him. (p 72 a-c)

[Injunction refused.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Plaintif (kontraktor utama) dan defendan (majikan) sebelum ini telah menandatangani satu kontrak bangunan biasa PAM, berikutan mana bon pelaksanaan ('PF') dan jaminan bank bagi jumlah yang dipegang ('BGRS') telah dimeterai bagi pihak defendan. Sepertimana yang berlaku, pertelingkahan telah berbangkit di antara pihak-pihak dan masaalah tersebut telah dirujuk kepada timbangtara. Berikutnya, plaintif menamatkan kontrak bangunan dan, mengkhuatiri bahawa defendan akan menuntut PF dan BGRS, memohon kepada Mahkamah Tinggi untuk injunksi bagi menghalang defendan dari menuntut dan/atau menerima dana yang berada di bawah PF dan BGRS.

Rayuan semasa plaintif ke Mahkamah Rayuan adalah terhadap keputusan yang arif hakim menolak permohonannya. Di hadapan yang arif hakim-hakim rayuan, perayu berhujah bahawa yang arif hakim telah tersalah arah akan dirinya kerana tidak mengendahkan kewujudan kontrak yang menjadi asas kepada pengeluaran PF dan BGRS.

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman lisan mahkamah:

[1] Ini adalah kes di mana terma-terma kontrak bangunan di antara pihak-pihak tidak dimasukkan ke dalam PF dan BGRS. Maka itu, kecuali untuk keperluan membuat tuntutan, PF di sini adalah tidak bersyarat dan kontrak yang wujud tidak menjadi sebahagian PF. Di mana sesuatu bon pelaksanaan itu dinyatakan sebagai tidak bersyarat dan merupakan jaminan berdasarkan tuntutan semata-mata, sepertimana halnya dengan PF dan BGRS di sini, maka injunksi mengikut terma permohonan plaintif adalah tidak wajar.

[2] Asas permohonan plaintif untuk injunksi adalah bahawa ia tidak melakukan apa-apa kemungkiran kontrak dan, oleh sebab itu, defendan tidak seharusnya membuat tuntutan terhadap PF dan BGRS. Bagaimanapun, isu sama ada wujud kemungkiran kontrak bangunan ataupun tidak telah dirujuk kepada timbangtara, dan sebarang dapatan mahkamah semasa atas isu tersebut akan melangkahi dapatan penimbangtara sekaligus melanggari bidangkuasa yang telah diletakhak kepadanya.

[Injunksi tidak dibenarkan.]

Case(s) referred to:
Barclay Mowlem Construction Ltd v. Simon Engineering (Aust) Pty Ltd [1991] APCLR 1 ***(dist)***
Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd [1995] 1 CLJ 283 SC ***(refd)***

For the appellant/plaintiff - Lim Chong Fong (HY Yong); M/s Azman Davidson & Co
For the respondent/defendant - Mahinder Singh Dulku (KY Lim); M/s KY Lim, Barnaby & Tan

[Appeal from High Court, Shah Alam; Originating Summons No: MT3-24-693-98]

Reported by Gan Peng Chiang

JUDGMENT
(Oral)

Gopal Sri Ram JCA:
This is the judgment of the court.

This is an appeal against the order of Low Hop Bing J refusing an injunction to restrain the respondent from demanding and/or receiving the monies under a performance bond dated 24 May 1997 and a bank guarantee for retention sum dated 8 August 1997. The brief background of facts against which this appeal rests may be shortly stated.

The appellant and respondent are parties to a building contract. The respondent is the employer; the appellant is the main contractor. The contract is in the standard PAM form. It was a term of the building contract that the performance bond and bank guarantee retention sum should be provided by the appellant to the respondent. Later, after the contract has been concluded and the works commenced, a dispute arose between the parties. That dispute is now before the arbitrator appointed pursuant to the arbitration agreement contained in the contract. By a letter dated 16 July 1998 the appellant terminated the contract they had with the respondent. They then apprehended that the respondent would call upon the performance bond and bank guarantee retention sum. They then approached the High Court for an injunction in the terms we have already described.

When this appeal was heard on 10 February 2004 Mr. Lim Chong Fong, learned counsel for the appellant, argued that the learned judge had misdirected himself on a crucial point as a result of which his decision was vulnerable to appellate intervention. Learned counsel went on to elaborate that the learned judge had completely overlooked the underlying contract between the parties which formed the foundation for the issuance of the performance bond and bank guarantee retention sum. He further argued that if the learned judge had taken into account the underlying contract, he would have exercised his discretion differently and granted the injunction. In support of his argument, Mr. Lim referred us to the decision of the New South Wales Supreme Court in *Barclay Mowlem Construction Ltd v. Simon Engineering (Aust) Pty Ltd* [1991] APCLR 1. In that case, Rolfe J held that on the documents before him, the bond incorporating the terms of the building contract could only be called upon if the defendant became contractually entitled to exercise its rights under the contract in respect of the security.

With respect, we do not consider Barclay Mowlem Construction to be an authority that supports Mr. Lim's argument. It is merely an authority for the proposition that on the face of the performance bond in that case an injunction was called for to protect the plaintiff's rights as the event for which the contract had provided for had not happened. We would also emphasize that Barclay Mowlem Construction was a case in which the terms of the building contract had been incorporated into the performance bond.

The present instance is readily distinguishable. Here, neither the performance bond nor the bank guarantee incorporated the terms of the building contract. As pointed out by our learned brother, Augustine Paul JCA, in the course of argument, the performance bond in the present appeal is unconditional, save that a demand should be made. The relevant clause of the performance bond in the present instance reads as follows:

a. If the Contractor (unless relieved from the performance by any clause of the Contract or by statute or by the decision of a tribunal of competent jurisdiction) shall in any respect fail to execute the Contract or commit any breach of his obligations thereunder then the Guarantor shall pay to the Principal up to and not exceeding the sum of Malaysia Ringgit: Four Million, Three Hundred Sixty Three Thousand Four Hundred Thirty Seven And Sen Ninety Only RM4,363,437-90, representing 5% of the Contract value or such part thereof, on the Principal's demand notwithstanding any contestation or protest by the Contractor or by the Guarantor or by any other third party. Provided always that the total of all partial demands so made shall not exceed the sum of RM4,363,437-90 and that the Guarantor's liability to pay the Principal as aforesaid shall correspondingly be reduced proportionate to any partial demand having been made as aforesaid.

It is abundantly clear from a plain reading of the aforesaid clause that the underlying contract forms no part of the performance bond.

There is a similar clause in the Bank Guarantee Retention Sum. It is in the following terms:

1. The Guarantor shall pay to the Principal up to but not exceeding in aggregate the sum of RINGGIT MALAYSIA FOUR MILLION THREE HUNDRED SIXTY THREE THOUSAND FOUR HUNDRED THIRTY SEVEN AND CENTS NINETY ONLY (RM4,363,437-90) representing 5% of the Contract Value or such part thereof, on the Principal's written demand notwithstanding any contestation or protest by the Contractor or by the Guarantor or by any other third party. The Principal may make partial demands provided always that the total of all partial demands so made shall not exceed the sum of RM4,363,437-90 and that the Guarantor's liability to pay the Principal as aforesaid shall correspondingly be reduced proportionate to any partial demand having been made as aforesaid.

In our judgment, by reason of the terms of the relevant documents that are called for interpretation here, the principle that governs the present case is contained in the decision of the Supreme Court in *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149. That case put an end to the heresy that an injunction can never be granted against the holder of performance bond from calling upon it. However, that decision is also authority for the proposition that an injunction is inappropriate where the performance bond by its terms is stated to be an unconditional and a pure on-demand guarantee. That is precisely the case before us.

There is an added feature in this appeal which makes an injunction inappropriate. The dispute between the parties is already before an arbitrator. The appellant's basis for applying for the injunction was that it had not committed a breach of the contract and therefore, the performance bond and bank guarantee for retention sum should not be called upon. That question whether the appellant is or is not in breach of the contract is manifestly one for the arbitrator to answer. A finding by the court on that issue in the suit would pre-empt the arbitrator's finding and encroach onto the jurisdiction already vested in him.

We have very carefully read the judgment on appeal. The learned judge has in his usual methodical style dealt with all issues raised before him and after a critical examination of the facts and weighing all the conflicting factors decided that the balance of convenience lay against the grant of an injunction. No criticism may be directed against the way the learned judge dealt with the case. This is, therefore, one of those cases where appellate intervention is not called for.

Accordingly at the conclusion of Mr. Lim's argument, we found it unnecessary to call upon counsel for the respondent to reply. Mr. Lim then took instructions from his client and informed us that he would be filing an application for leave to appeal to the Federal Court. Having regard to the urgency of the matter, counsel asked that the reasons for our decision be given speedily. We appreciate the difficulty in which the counsel found himself. Accordingly, we called on the appeal this morning for the purpose of giving our reasons.

All we need add is that at the conclusion of the hearing of this appeal on 10 February 2004 the appeal was dismissed and the usual orders consequential on dismissal were made.